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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 365

DR. A. W. BOYD, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF ON BEHALF OF THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The *per curiam* opinion of the Circuit Court of Appeals, from which this case comes on writ of certiorari, is reported in 4 F. (2nd) 1014. It appears also at R. 96.

GROUNDS OF JURISDICTION

The judgment to be reviewed is that of the Circuit Court of Appeals for the Sixth Circuit, dated April 6, 1925, appearing at R. 95-96.

By this judgment the Circuit Court of Appeals affirmed the judgment of the District Court, con-

victing the petitioner of violation of the Harrison Anti-Narcotic Act. (Act of December 17, 1914, c. 1, 38 Stat. 785, as amended by Secs. 1006–1007 of the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1130.)

This Court, on May 11, 1925, granted a writ of certiorari (26 — U. S. —), under Section 240 of the Judicial Code. (Act of March 3, 1911, c. 231, 36 Stat. 1087, 1157.)

STATEMENT

The petitioner, a physician duly registered under the provisions of the Harrison Anti-Narcotic Act, was indicted in the Eastern District of Tennessee for violation of Section 2 of that Act. The indictment (R. 1–11) contained thirteen counts, upon six of which (Counts 2, 3, 4, 11, 12, and 13) the petitioner was found guilty. Of these, Counts 2, 3, and 4 charged three sales of narcotics, on different days, to one Annie Davis. Counts 11, 12, and 13 charged three similar sales to one Frank O'Hara.

The exact language of the indictment is of considerable importance and serves to distinguish this case very clearly from that of *Linder* v. *United States,* 268 U. S. 5. Count Two is therefore set forth in full as an example. The other counts are similar.

> (R. 1–2.) The Grand Jurors aforesaid, upon their oaths aforesaid, do further find, charge and present; that in Hamilton County, Tennessee, and within the jurisdic-

tion of this Court, on the 13th day of August, 1923, A. W. Boyd, who was then and there a physician dispenser in opium, morphine, cocaine, and other narcotic drugs, specified in an Act of Congress approved December 17, 1914, and amendments thereto, and who had duly registered with the Collector of Internal Revenue of the United States for the District of Tennessee, and paid the special tax required of such physician dispensers under the aforesaid statute, did knowingly, wilfully and feloniously barter, sell, dispense, exchange and give away to one Annie Davis a quantity of a narcotic drug, to wit: 40 grains of morphine sulphate, which then and there consisted of opium and compounds and derivatives of opium, the said bartering, selling, exchanging, dispensing and giving away of the aforesaid morphine sulphate *not being in pursuance of a written order of the said Annie Davis on a form issued in blank for that purpose by the Commissioner of Internal Revenue of the United States,* in manner following, to wit: That the said A. W. Boyd, at the time and place aforesaid, did issue and dispense to said Annie Davis a certain prescription, in the following words and figures, to wit:

"AUG. 13, 1923.

"For Annie Davis, 4041 Cherry St., Age 38 years, Addict for 21 years, Incurable senility, Morphine Sulphate 40 grs. Sig. As directed.

(Signed) A. W. BOYD."

and the said morphine sulphate was dispensed and distributed by the said A. W. Boyd *not in the course of his professional practice only,* the said A. W. Boyd intending and believing that said prescription would be filled by the retail dealer in opium, morphine, cocaine, and other narcotic drugs, under the provisions of the Act aforesaid, and which said prescription was filled by Hennessee Bros. Pharmacy, a retail dealer as aforesaid, and the narcotics called for therein placed in the possession of the aforesaid Annie Davis as then and there intended by said A. W. Boyd; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

It will be seen that this indictment (unlike that in *Linder's case,* and unlike that in *United States* v. *Behrman,* 258 U. S. 280) expressly negatives the defense of "administration in the course of *bona fide* professional practice." In this respect, as will be shown hereafter, the indictment was amply supported by the proof. In point of law it is identical with the indictment sustained by this Court in the second *Jin Fuey Moy* decision, 254 U. S. 189.

It was conceded that the petitioner had written prescriptions substantially as set forth in all the counts on which he was found guilty. (R. 51–52.) It was proved that prescriptions corresponding in names, amounts, and dates to those charged in the indictment had been filled by the retail druggists

named in each count. (R. 18–19.) It was conceded that the petitioner had not received official order forms, as required by law, from any of the parties to whom drugs were dispensed. It therefore became a material issue whether or not the petitioner had acted in good faith in the course of his professional practice. The petitioner contended that he had so acted, and that he was honestly endeavoring to cure those who applied to him for prescriptions. The trial was conducted throughout by both sides upon the issue of good faith thus presented, and upon it the jury found a verdict against the petitioner.

An examination of the evidence discloses the utter lack of merit in the petitioner's claim of good faith. During the five months from May to September, 1923, the petitioner testified that he was giving treatment in his office to "an average of twenty to thirty patients." (R. 48, 52, 55–56.) To meet the requirements of these "patients" the petitioner, during these five months, purchased from three drug stores the enormous total of 36,300 half-grain tablets of morphine sulphate. (R. 23–25; cf. Appendix, *infra*, p. 36.) When asked, prior to trial, by a narcotic agent to produce his dispensation record, the petitioner stated that he had kept none. (R. 15.) Upon being asked to write down a list of his "patients," he was able to give only four names, and then "became very angry" and refused to give any list at all. (R. 16.) When confronted at the trial with the record of his purchases,

the petitioner became very badly confused, testifying first that he had purchased 17,000 tablets and then that he had purchased 3,600. (R. 51.) Finally he admitted having purchased 32,700 tablets before September 9th, 1923. (R. 51.) During this same period, in addition to the treatment administered in his office, he wrote 802 prescriptions for seventy-three other "patients," calling for more than 25,000 grains additional. (R. 52.)

One-fifth of a grain is the recognized normal dose of morphine. (Wood's U. S. Dispensatory, quoted in *United States* v. *Behrman,* 258 U. S. 280, 289.) On this basis the petitioner's office practice alone (not including the "prescriptions" which his patients had filled at drug stores) required the administration of 18,150 normal doses (3,630 grains) each month. Evidence was given (R. 24, 39) that the average reputable physician would require per month only *25 to 50 doses* (5 to 10 grains.) On this basis, therefore, the petitioner's requirements were *between three hundred and sixty and seven hundred times greater than those of the ordinary reputable physician.* Evidence was also given (R. 40) that six hundred grains *per year* would be as much as any doctor could use "under any conditions." The petitioner was using more than six times that amount *per month.* On this basis, therefore, his requirements remained more than *seventy times* the maximum possible for any physician *"under any conditions."*

The petitioner insisted, however, that he had discovered a cure for addiction. The efficacy of this cure is best demonstrated by the fact that one of his patients (the witness Annie Davis) had been coming to him for " treatment " for many years; but she was still so far from being cured that she required a forty-grain " prescription " every five or six days. (R. 26–27. Indictment, Counts 2–4, R. 1–4.) (It may be taken as established by the testimony of the Government's experts (R. 33, 39) and by the admissions of the petitioner himself (R. 51, 52) that morphine could not possibly be a proper treatment for the disease (asthma) indicated on Annie Davis's prescriptions. The petitioner himself did not seriously contend that he administered the drug to her as a cure for asthma or for any other disease. He stated he was doing it to " get her off of hyocine " (R. 51), and added:

> She was using all the morphine she could get. (R. 52.)

The petitioner claimed to have treated ninety patients, of whom he declared he had cured eighteen. (R. 47, 52.) Nearly all of the patients, however, who appeared as witnesses, either for the prosecution or for the defense, testified that they were still addicted. The witness Ellington, it is true, testified point-blank that he was "cured." (R. 68.) But immediately after giving this testimony, he was examined in the hall of the courthouse by two

physicians, who subsequently testified that he was *not* cured, that, on the contrary, he was still an addict and had that very morning received an injection of morphine. (R. 75–78.) As a result of this testimony, Ellington was lodged in jail. (R. 77.)

The course of "treatment" consisted in giving the patient a bottle of an anti-acid mixture or tonic compounded by the petitioner, together with a prescription for morphine to be filled by a druggist. (R. 45–51.) Both the tonic and the morphine were entrusted absolutely to the control of the addict, who was at liberty to take either or both in such quantities and at such times as he wished. The result of this lack of supervision in the "treatment" is shown by the case of Stella McRay, who testified (R. 42):

> During this time I was getting morphine from him, when he got me down so low I got from somebody else, that is, down to ten grains. I sent a maid down to dark town to get it from bootleggers. Dr. Boyd did not give me any large bottles. He gave me a tonic, a bottle about that long. *I would take the tonic off some place and set it down, because I believed the tonic killed the morphine. I wouldn't take it.* I did not tell Dr. Boyd I wasn't taking it. He didn't know that. I would not come back with the bottle and get more; he would give me a new bottle. I guess I got between seventy-five and fifty bottles of that from him during the five months. I certainly believe he cut me down

> as low as ten grains a day. I couldn't stand it that low. I went to somebody else.

The witness Thompson, called by the defense, testified that he also would sometimes obtain an additional supply of drugs from other sources. (R. 73.)

The amount of morphine prescribed in each case sometimes remained constant, and sometimes increased. Thus the witness Annie Davis, on August 2nd, 1923, received a prescription for 48 grains, or 240 normal doses. (R. 26.) This lasted her until August 9th—an average of seven grains per day. On August 9th she received another prescription for 48 grains, which lasted only until August 13th—an average of *twelve* grains per day. (R. 26.) On August 13th she returned and obtained a third prescription. (R. 26.) Similarly, the witness O'Hara was started by Dr. Boyd on a treatment calling for eight grains per day. After eight months' treatment he had been reduced to "about seven or eight grains." (R. 31.) And after three years he was still receiving 28 grains every six days. (R. 32.) The patient Hazel Will was under treatment from May to October, 1923, and was not reduced at all. (R. 58.) When called upon to explain these facts the petitioner declared (R. 58):

> I have been persecuted by the public, local officers, and everybody, and yet I tried to help them, and if you find one not improved I will change my plea, *improved in the amount of morphine.*

Then (apparently realizing that this statement could scarcely be justified, in view of the evidence), he at once corrected himself, adding (R. 58):

> It doesn't matter; *it isn't the amount of morphine; it is their condition.*

The medical witnesses called by the prosecution testified unhesitatingly that the petitioner's treatment was, from a medical standpoint, utterly worthless. (R. 34, 38–40.)

Dr. Williamson testified (R. 38):

> The treatment for morphinism or drug addiction is to take it away from them. That is the recognized treatment. While I was connected with drug addicts at the city clinic I made a special study of the disease. *It is recognized by the medical practice that what is known as a perambulatory treatment is an unsuccessful and useless effort.* You can not control a patient if he is getting morphine promiscuously and taking it as he pleases.

Even the witnesses for the defense, including the petitioner himself, were driven to the same conclusion. Dr. Holtzclaw, a defense witness of unquestioned standing and high reputation, declared on cross-examination (R. 64):

> I doubt it very materially that any ordinary addict suffering with any disease or not suffering from any other disease, ever could be cured while the narcotic drug was placed in his hands in quantities of thirty, forty,

> and forty-eight grains in his unrestricted control.

These amounts were shown to have been administered by the petitioner to his patient, Annie Davis, and others. Dr. Holtzclaw went on to say (R. 65):

> He says it is so easy. I will give him another dose, and they give him hypodermic doses, but it is too much trouble to run there all the time, and they give him a little in the bottle. *That doctor who did that is also ignorant or incompetent, if he lets him have any to carry off with him.* * * * I say, let him remove the cause and the patient will get well by himself, *and see to it that he don't get any morphine to pack off with him, because morphine is the worst thing he can possibly take.*

The defendant's own testimony is a mass of contradictions and evasions. He had a chemist who was engaged at his request in analyzing the poison caused by morphine addiction; but he was uncertain as to this chemist's name. (R. 49.) He declared first that he could not, and then that he could, withdraw the allowance of morphine from his patient, James Pinson. (R. 50.) He admitted that he was "not doing a general practice" (R. 51), and later stated (R. 58):

> in the course of the practice of medicine only, I wouldn't use one bottle containing 100 half grain tablets in a year.

He was unable to explain why he gave *twenty* patients 32,000 tablets between May and Septem-

ber, while prescribing over 25,000 tablets for *seventy-three* other patients during a longer period. (R. 56.) He was driven finally to admit the complete ineffectuality of any "treatment" which did not include close supervision by the physician over his addicted patients, saying:

> (At R. 54.) They were cured if I could have kept them under my control, but they get out and get drunk and take it again.
>
> (At R. 59, on redirect examination.) I absolutely regarded it as a part of my professional duty to write these prescriptions in aid of my treatment for the morphine habit. I cut them down half of the amount they were taking when they came to me *and personally administered it.* I want to correct that. If his condition was such that he could not exist, I would again increase. But I never took his word for it. That is why I administered it personally. *That is not why I gave prescriptions. I couldn't cut down the prescriptions half because I wouldn't see the patient often. When* I am administering it myself he returns and I see him. *The party with the prescription goes away and I don't see them.*

The charge of the Trial Judge (save for one portion hereafter discussed) is conceded by petitioner to have been satisfactory. The Judge pointed out that the petitioner was entitled to an acquittal if he had acted in good faith in the course of his professional practice. (R. 84.) He added (R. 84.):

> If that question is left reasonably doubtful as to whether he did it in good faith *for the purpose of curing disease or relieving suffering or otherwise,* then the defendant would be entitled to the benefit of the doubt, and entitled to an acquittal.

At the end of the charge he added (R. 88):

> I am requested to say to you, gentlemen, that in determining whether or not the defendant prescribing morphine to his patients was honestly seeking to cure them of the morphine habit while applying his curative remedies, it is not necessary for the jury to believe that defendant's treatment would cure the morphine habit; but it is sufficient if defendant honestly believed his remedy was a cure for this disease.
>
> I instruct you that if that is true, *regardless of whether the course of treatment given by this defendant is a cure, the question is, was he honestly and in good faith in the course of his professional practice* and in an effort to cure disease issuing these prescriptions.

A verdict of guilty was returned, and the petitioner was sentenced to fine and imprisonment. (R. 13.) The judgment was affirmed by the Circuit Court of Appeals, and the case is now here on writ of certiorari. The sole question raised by the petitioner involves a portion of the Trial Judge's charge, to which no exception was taken at the time of trial, but which is now claimed to be contrary to the decision of this Court in *Linder* v. *United States,* 268

U. S. 5. The Government submits that this language, considered in connection with the evidence and with the rest of the charge, was eminently fair to the petitioner and is in no way contrary to the decision in *Linder's case*. The record discloses ample proof of violation of the Harrison Act from the standpoint alike of morals and of revenue, and the conviction of the petitioner should be sustained.

ARGUMENT

SUMMARY

I. The indictment in this case was sufficient in law and was amply supported by the proof.

II. The petitioner's case is founded upon an assignment of error not properly cognizable in this Court.

III. On the assumption that the charge is properly before the court for review, the Government submits that it contains no prejudicial error.

IV. In the light of accepted medical standards, the charge of the trial judge was more favorable to the petitioner than he was entitled to demand.

V. The record discloses a clear violation of the revenue provisions of the Harrison Act.

I

The indictment in this case was sufficient in law and was amply supported by the proof.

As already pointed out, the indictment in this case presents no difficulties. It is similar to the indictment approved by this Court in the second *Jin Fuey Moy* decision, 254 U. S. 189. Unlike the indictments in *Linder* v. *United States*, 268 U. S. 5, and *United States* v. *Behrman*, 258 U. S. 280, it contains in each count an express allegation that the dispensing of the drug was "*not in the course of the defendant's professional practice only.*" In

Behrman's case, the dissenting opinion appears to have criticized the absence of just such an allegation (258 U. S., at p. 290):

> Of course the facts alleged suggest an indictment in a different form, but the Government preferred to trust to a strained interpretation of the law rather than to the finding of a jury upon the facts.

In the case at bar the indictment was prepared "in a different form," and the finding of the jury upon the facts has sustained its allegations.

The proof, already discussed at length, was ample to sustain the verdict. The petitioner admitted (R. 46, 48) having given the prescriptions alleged. The enormous volume of his traffic in narcotic drugs, and the utter worthlessness of his "cure," are ample to warrant a finding of bad faith. As this Court declared in *United States* v. *Jin Fuey Moy,* 254 U. S. 189, 194:

> Manifestly the phrases "to a patient" and "in the course of his professional practice only" are intended to confine the immunity of a registered physician, in dispensing the narcotic drugs mentioned in the act, strictly within the appropriate bounds of a physician's professional practice, and not to extend it to include a sale to a dealer or a distribution intended to cater to the appetite or satisfy the craving of one addicted to the use of the drug. A "prescription" issued for either of the latter purposes protects neither the physician who issues it nor the dealer who

knowingly accepts and fills it. *Webb* v. *United States*, 249 U. S. 96.

It is submitted that, upon the indictment and proof, the guilt of the petitioner was clearly established. His sole argument in this Court is directed, however, to another point; namely, to a portion of the Trial Judge's charge. This will now be discussed.

The petitioner's case is founded upon an assignment of error not properly cognizable in this Court.

In this case the petition for certiorari was based upon a single ground; namely, upon error in a portion of the Trial Judge's charge to the jury. (R. 89.) *No exception was taken at any time to this or to any other portion of the charge.* At the trial it was allowed to pass unnoticed, presumably because counsel at that time regarded the charge as fair to their client and were unable to detect any error therein. The alleged error was only discovered and brought to the attention of the Trial Judge on a motion for a new trial after a verdict of guilty had been rendered. When the motion for a new trial was denied, this assignment of error was incorporated in a bill of exceptions, and by this means it was brought up to the Circuit Court of Appeals and to this Court.

As this Court has often pointed out, errors in the charge of a trial judge must be specifically called to his attention *before the jury retires from the bar,* in order that he may have an opportunity

to correct them on the spot, and thus to prevent a mistrial.

As was said in *Fillippon* v. *Albion Vein Slate Co.,* 250 U. S. 76, 82:

> It is not correct, however, to regard the opportunity of afterwards excepting to the instruction and to the manner of giving it as equivalent to an opportunity to be present during the proceedings. To so hold would be to overlook the primary and essential function of an exception, which is to direct the mind of the trial judge to the point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. *United States* v. *U. S. Fidelity Co.,* 236 U. S. 512, 529; *Guerini Stone Co.* v. *Carlin Construction Co.,* 248 U. S. 334, 348.

To the same effect are *Exporters* v. *Butterworth-Judson Co.,* 258 U. S. 365; *Frey & Son* v. *Cudahy Packing Co.,* 256 U. S. 208, 215; *O'Connell* v. *United States,* 253 U. S. 142; *McDermott* v. *Severe,* 202 U. S. 600, 610; *Robinson & Co.* v. *Belt,* 187 U. S. 41, 50; *Beaver* v. *Taylor,* 93 U. S. 46, 55.

The importance of timely exceptions to the charge has not been lessened by the amendment to Section 269 of the Judicial Code, authorizing courts to give judgment on appeal "without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

(Act of Feb. 26, 1919, c. 48, 40 Stat. 1181.) *Fillippon* v. *Albion Vein Slate Co.,* supra; *Nobile* v. *United States,* 284 Fed. 253, 256; *Sevensma* v. *United States,* 278 Fed. 401, 404; *Harris* v. *United States,* 273 Fed. 784, 789; *Rich* v. *United States,* 271 Fed. 566, 570.

The rules of this Court expressly provide (Rule 7 (1)):

> No bill of exceptions shall be allowed on a general exception to the charge of the court to the jury in trials at common law. The party excepting shall be required *before the jury retires* to state distinctly the several matters of law in such charge to which he excepts; and no other exceptions to the charge shall be allowed by the court or inserted in a bill of exceptions.

In the case at bar, the alleged error in the charge was in no way brought to the attention of the judge until after a verdict had been rendered. It was then, of course, too late to correct it. An assignment of error predicated thereon has no proper place in any bill of exceptions. The Circuit Court of Appeals accordingly declared in this case that the charge was not properly before it for review. 4 F (2nd) 1014 (R. 96). It is submitted that this declaration was correct. Frequent mistrials can only be avoided if alleged errors are brought directly to the attention of trial Courts while opportunity for correction still exists. "Their action should not be reversed upon questions which the

astuteness of counsel in this court has evolved from the record." *Robinson & Co.* v. *Belt,* 187 U. S. 41, 50.

In criminal cases, the same rule remains applicable, especially when, as in the case at bar, the evidence overwhelmingly points to the guilt of the defendant. If needless retrials and inordinate delays of justice are to be avoided, objections must be taken in proper time. It is the clear duty of counsel to point out specific errors in the charge, and to request that they be corrected, before it is too late. Objections taken after a verdict of guilty give no opportunity for prompt correction, and serve only to perpetuate error in the record.

It is accordingly suggested that this Court should decline to consider the assignment of error directed to the charge of the Trial Judge. And since it is upon this assignment alone that the petitioner's whole case is founded, it is submitted that the writ of certiorari should be dismissed.

III

On the assumption that the charge is properly before the Court for review, the Government submits that it contains no prejudicial error.

The portion of the charge upon which the petitioner's case is founded is as follows (R. 86, 89):

> I further instruct you in this case that if you believe beyond a reasonable doubt that these different parties, Annie Davis, O'Hara, O'Neil, Goodman, applied to this defendant

Boyd for drugs or for prescriptions for drugs, and if you believe that beyond a reasonable doubt that this defendant Boyd knew that they were addicts, and that although he was undertaking to cure them of the drug addiction, if you believe beyond a reasonable doubt that as to these patients or so-called patients or as to any of them, that he wrote for them these prescriptions or for any of them the prescriptions set out in the indictment, *and that he wrote those prescriptions for excessive amounts of morphine,* that is to say, excessive in this, that he wrote the prescriptions for amounts of morphine *for a great number of doses of morphine,* more than was sufficient for the necessity of any one particular administration of it, and that by virtue of his writing these prescriptions for these large amounts or excessive amounts of morphine, more than sufficient for any one particular administration of it, that this caused these prescriptions to be filled by the druggists and these *excessive amounts of morphine* to thus be put into the hands of an addict to be self-administered by them *over a succeeding period of days, considerable number of days,* with nothing to guide or direct the self-administration of that morphine except the weakened will of the addicts themselves, if you find such a state of facts as that, gentlemen, then the law declares that the defendant has violated the law, and, as I say, it would be no defense to him, gentlemen, that the druggists would not fill the prescriptions

> for smaller amounts, because he would not be compelled to violate the law.

In other portions of the charge, quoted *supra,* p. 13, the jury were very clearly instructed that good faith was a complete defense. They were told that the petitioner would be entitled to an acquittal (R. 84)—

> if that question is left reasonably doubtful as to whether he did it in good faith *for the purpose of curing disease or relieving suffering or otherwise.*

They were further instructed that it would be proof of guilt if they found that he had given the prescriptions (R. 85)—

> not as a physician in the course of his professional practice only, but simply as a commercial proposition to make money for himself or simply to satisfy the cravings of an addict for drugs.

The portion of the charge last quoted was in accordance with the decision of this Court in *Webb* v. *United States,* 249 U. S. 96, 99–100. It is submitted that the portion of which the petitioner complains must be considered in relation to the charge as a whole. Taken as a whole, the charge fully and fairly presents the issue of good faith, and contains no error. The jury could not possibly have been misled.

Even when considered piece by piece, the charge is still correct. The petitioner's argument is based upon the supposed repugnance between the portion

of the charge already quoted (*supra*, pp. 19–21) and the decision of this Court in *Linder's case*, 268 U. S. 5. It is submitted that no such repugnance exists.

In *Linder's case*, the indictment did not "question the doctor's good faith nor the wisdom or propriety of his action according to medical standards." It did not allege "that he dispensed the drugs otherwise than to a patient in the course of his professional practice or for other than medical purposes." It was upon these defects in the indictment that Linder's counsel almost entirely relied; and upon them the decision of this Court was largely based. In the case at bar, the indictment directly challenged Dr. Boyd's good faith, and directly denied that he administered the drugs in the course of his professional practice. No question of its insufficiency is raised.

In *Linder's case*, moreover, the indictment charged the defendant with giving away *four* tablets containing morphine and cocaine. The proof (Record in No. 183, Oct. Term, 1924, at p. 111) apparently showed that he had given away but *three*, containing ½ grain each, or between 7 and 8 normal doses in all. In the case at bar the indictment *and proof* alike show that the petitioner prescribed to one of his "patients" (Annie Davis), during a period of eleven days, the enormous total of 136 grains, or 680 normal doses. (R. 26; Indictment, Counts 2–4.) And in addition to this he was dispensing enormous quantities to many others.

In *Linder's case* this Court declared that "the facts disclosed indicate no conscious design to violate the law." In the case at bar, proof of such a design is given by the appalling volume of the petitioner's traffic in drugs, coupled with his refusal to give any list of his "patients" (R. 16), by his inability to give any coherent account of his purchases (R. 51–52), and by the overwhelming evidence of reputable physicians as to the worthlessness of his "cure" (*supra*, pp. 10–11).

In the portion of the charge to which exception is taken, the Court nowhere denied the right of a physician to prescribe "moderate amounts of drugs for self-administration in order to relieve conditions incident to addiction." (*Linder* v. *United States*, 268 U. S. 5, 22.) On the contrary, in the portion of the charge above quoted (p. 13) the Court expressly recognized that right. Similarly the Court clearly recognized "that the accused doctor might have lawfully dispensed some doses." (*Linder's case*, at p. 20.)

What the Court said was this (R. 86):

> [the verdict must be guilty if you believe] * * * that he wrote those prescriptions for *excessive amounts of morphine*, that is to say, excessive in this, that he wrote the prescriptions for amounts of morphine *for a great number of doses* of morphine, more than was sufficient for the necessity of any one particular administration of it * * * to be self-administered by them over a suc-

ceeding period of days, *considerable number of days.*

This is not a denial of the right of a doctor to prescribe *moderate* amounts of narcotics for his patients. It is not a denial even of the right of a doctor to give narcotics to his patients for self-administration, if necessary. It is a denial only of the right to prescribe *excessive* amounts for self-administration over a *considerable number of days,* without guidance or control by the physician. This was the practice condemned in *United States* v. *Behrman,* 258 U. S. 280; and in the case at bar the principal witness for the defense declared that any physician who followed it was " ignorant or incompetent." (R. 65.)

The facts of this case disclosed no dispensing of " *moderate* " amounts of morphine. They disclosed exactly what the charge declared—the dispensing of *excessive* amounts *for a great number of doses* to be administered *over a considerable number of days,* without any attempt at supervision or control. The petitioner himself admitted (R. 54, 59, *supra,* p. 12) that he exercised no control over his " prescription " patients, at least two of whom (Annie Davis and Frank O'Hara) were proved to have been coming to him for " treatment " for several years.

The latter of these received 28 grains, or 140 normal doses, regularly every six days. (R. 32.) The former, in eleven days, from August 2nd to

August 13th, received 136 grains, or 680 normal doses. (R. 26.)

It is in the light of these facts, and of the others already discussed (*supra*, pp. 5–12) that the charge must be considered; and in that light, every word of it was justified. There was evidence to show that patients received prescriptions for " a great number of doses," and there was evidence to show that these doses were to be self-administered, contrary to all standards of medical practice, " over a considerable number of days." That evidence, it is submitted, warranted a verdict of guilty; and the charge was in full accordance with the decisions of this Court.

United States v. *Behrman*, 258 U. S. 280.
United States v. *Jin Fuey Moy*, 254 U. S. 189.
United States v. *Doremus*, 249 U. S. 86.
Webb v. *United States*, 249 U. S. 96.
Simmons v. *United States*, 300 Fed. 321.
Manning v. *United States*, 287 Fed. 800.

IV

In the light of accepted medical standards, the charge of the trial judge was more favorable to the petitioner than he was entitled to demand.

The record in this case shows that the petitioner relied, at the trial, upon a claim of good faith based upon the so-called " ambulatory method " of curing drug addicts. This was, in fact, the only color of defense which was open, under the evi-

dence. It was urged at the trial, and it is urged by counsel here, that the "ambulatory treatment" is an altogether proper method of cure, and that any doctor who follows it is to be considered as engaged in good faith in the course of his professional practice. This view was apparently accepted by the Trial Court, with the limitation that the amounts dispensed by the "ambulatory treatment" must not be "*excessive,*" nor sufficient to form a supply for self-administration "*over a considerable number of days.*"

The Government, however, submits that the "ambulatory treatment" may properly be regarded as constituting, *per se,* an unprofessional and illegal method of practice, which can not be defended by reference to any accepted medical standards. And if this is true, then the Trial Judge might properly have charged the jury that it was unlawful, *under the facts disclosed,* not merely to prescribe *excessive* doses for self-administration, but to prescribe *any doses at all.* From this aspect, the charge which was actually given, instead of being prejudicial to the petitioner, may be regarded as more favorable than he was entitled to demand.

At the outset, it should be made clear that this contention of the Government in no way conflicts with the decision of this Court in *Linder's case.* No overruling of that decision is sought.

In *Linder's case,* this Court was not confronted with the "ambulatory treatment," or with any-

thing akin to it. That case is authority for the proposition that a physician may lawfully prescribe—

> moderate amounts of drugs for self-administration *in order to relieve conditions incident to addiction.*

The "ambulatory treatment" is something altogether different from this. That treatment consists in constantly prescribing narcotics (usually as in the case at bar, in large quantities, sufficient for several days' supply) for self-administration by addicts, *not* for the purpose of relieving conditions incident to addiction, but in the futile hope that the patients may effect their own cure. The two practices are altogether distinct; and merely because self-administration may be proper in the one case, it is not necessarily proper in the other.

The worthlessness of the "ambulatory treatment" is to be found, of course, in the weakened will of the patient. It is useless to expect him to effect his own cure, when a more or less constant supply of the drug is placed in his own hands, and when, in the administration of it, he is placed beyond professional guidance or control. *United States* v. *Behrman,* 258 U. S. 280, 289.

Every physician who testified in the case at bar unhesitatingly declared that the "ambulatory treatment," as a cure, was utterly futile and unprofessional. The petitioner's own witness, Dr. Holtz-

claw, was of the same opinion, and the petitioner himself was driven to admit that this opinion was correct. This testimony has already been reviewed in full (*supra,* pp. 10–12) and need not be repeated here. Two additional facts may be noted. The committee of the American Medical Association, appointed to investigate this very subject, has officially reported that the " ambulatory treatment " is *per se* a violation of professional standards, and has recommended to both Federal and State authorities the adoption of the most stern measures to punish, as criminals, all physicians who attempt to follow it. Their report (contained in the Journal of the American Medical Association) is quoted at length in Appendix B to this brief (*infra,* p. 39). And the Supreme Courts of at least three States (including the State where this petitioner resides) have declared that the practice of the " ambulatory treatment " constitutes sufficient cause for revoking the license of the physician who follows it, or for punishing him as a criminal.

Commonwealth v. *Noble,* 230 Mass. 83.

Knoop v. *State Board of Health,* 41 R. I. 283, 286.

Hyde v. *State,* 131 Tenn. 208.

It must be conceded, of course, that the Federal Government is without power to regulate the practice of medicine in the States. But it is clear that Congress, in enacting a revenue statute, may properly impose one tax upon *physicians* and another upon *dealers* in narcotic drugs. *United States* v.

Balint, 258 U. S. 250; *United States* v. *Doremus,* 249 U. S. 86. And in defining the exemption conferred upon "*physicians*" under the Anti-Narcotic law, Congress has properly limited that exemption to registered physicians who dispense narcotics *in the course of their professional practice only.* Act of Dec. 17, 1914, c. 1; s. 2 (38 Stat. 785, 786).

Obviously the mere fact that an individual is a physician confers no immunity from the restrictions imposed by the Act. Otherwise any physician, by virtue of his status alone, would be at liberty to sell or to give away unlimited quantities of drugs to all comers, precisely as Dr. Jin Fuey Moy was charged with doing. *United States* v. *Jin Fuey Moy,* 254 U. S. 189.

If the words of the statute—" in the course of his professional practice only "—are to be given any meaning at all, they must be taken as incorporating into the statute a reference to existing reasonable medical standards. That Congress has power to make such a reference can not be questioned. Physicians, in other words, are privileged only so long as their conduct approximately follows the reasonable standards of their profession. The " ambulatory treatment " of curing addicts has been declared by competent medical authority, and has been proved by testimony in the present record, to be a violation of those standards. It has been outlawed by the medical profession itself. It is submitted that a physician who follows it should be no more entitled to plead " professional

practice " than one accused of murder should be entitled to plead his belief in euthanasia.

Upon this theory, therefore, it would be unlawful to prescribe narcotics in any quantity for self-administration *with a view to effecting a cure of drug addiction, and not with a view to relieving conditions incident to addiction.* The petitioner's colorable purpose—at least according to his own claims—was clearly to effect a cure. It follows, therefore, that the Trial Judge might properly have gone further than he actually did go. He might have charged that it would be unlawful to prescribe *any amount* (whether excessive or not) in the manner and with the purpose here shown. And if the prescribing of a single dose under the " ambulatory treatment " is unlawful, the petitioner clearly can not complain of a charge which permits him to prescribe such doses so long as they are not " excessive." In this view of the law the charge was more favorable than the petitioner had any right to demand.

V

The record discloses a clear violation of the revenue provisions of the Harrison Act.

This Court has on several occasions declared that the Harrison Anti-Narcotic Act depends for its constitutionality upon the fact that it is a revenue measure, and that its penal provisions can be supported only as aids in the collection of a tax. It seems desirable, therefore, to point out the man-

ner in which the revenue features of the Act have been violated in this case.

Section 2 of the Act provides (Act of December 17, 1914, c. 1, 38 Stat. 785, 786):

> That it shall be unlawful for any person to sell, barter, exchange or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—
>
> (*a*) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this Act in the course of his professional practice only. * * *
>
> (*b*) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this Act. * * *

Section 1 of the Act (as amended by S. 1006 of the Act of February 24, 1919, c. 18, 40 Stat. 1057, 1130) provides for a tax of $3 per annum upon registered physicians, and for a different and higher tax upon dealers; namely, $12 per annum upon wholesalers, and $6 per annum upon retailers.

The purpose of Section 2 is to secure "a close supervision of the business of dealing in these dan-

gerous drugs by the taxing officers of the Government." *United States* v. *Balint,* 258 U. S. 250, 254. It is obvious that Congress intended to draw a sharp line between *physicians* and *dealers.* To the *physician,* dispensing in good faith in the course of his professional practice, was accorded a special exemption from the requirement of obtaining official order forms. To the *dealer,* dispensing on a physician's prescription, was accorded a similar exemption. But the two classes remain distinct. Each must dispense drugs according to the rules of his own profession, if he is to remain taxable as a member of that profession. If a physician, under cloak of his practice, dispenses drugs without regard to accepted medical standards, and in quantities enormously exceeding those usually dispensed by physicians, he ceases to be taxable as a physician, and becomes taxable as a dealer.

Another danger was recognized by this Court in *United States* v. *Doremus,* 249 U. S. 86, 94-95:

> This case well illustrates the possibility which may have induced Congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least Congress may have deemed it wise to prevent such possi-

ble dealings because of their effect upon the collection of the revenue.

The amount of drugs which Doremus was charged to have dispensed to Ameris was five hundred one-sixth grain tablets of heroin. In the case at bar, Annie Davis received one hundred and thirty-six grains in eleven days. (R. 26.) O'Hara received twenty-eight grains every six days. (R. 32.) Obviously the same danger of illicit resale which was present in the *Doremus case* was present also in the case at bar.

It may, of course, be objected that the petitioner in this case did not himself sell the narcotic drug. He merely issued prescriptions which were subsequently filled by druggists. It would seem clear, however, that this course of conduct makes him liable as a principal in the sale, under Section 332 of the Penal Code. *United States* v. *Jin Fuey Moy,* 254 U. S. 189. By the wholesale dispensing of *prescriptions,* as well as by the wholesale dispensing of the drugs themselves, without any regard to accepted medical standards, a doctor properly may be regarded as a dealer. And if he fails to register and pay the dealer's tax, he may be properly indicted under the statute.

The Government recognizes that the standards of a physician's practice can not be measured by iron rules. There are reasonable limits which neither judge nor jury can invade, within which the needs and discretion of the individual physi-

cian are supreme. But it is submitted that all reasonable limits have been passed in this case. If the petitioner had contented himself with dispensing the same amount of narcotics as other physicians—if he had dispensed twice, five times, or even ten times that amount—he might still have laid claim to good faith, and might still have been regarded as engaged in the legitimate practice of his honorable profession. But when, in defiance of all medical standards, he embarked upon a course which required the dispensing of between three hundred and seven hundred times the amount needed by ordinary physicians, administered to patients whom he admits to have been beyond his supervision or control, he then ceased to be a physician save in name only. He became, to all intents, a dealer and should have registered and paid the dealer's tax.

To hold otherwise would obliterate the lines drawn by Congress, and would render the Harrison Act utterly unenforceable, not merely as a police regulation but as a measure designed for the raising of revenue. If this petitioner has not exceeded the permissible limits of a physician's *bona fide* practice, it is impossible to conceive of any case where those limits can ever be exceeded. If every doctor in the United States is at liberty to prescribe twenty thousand doses a month (R. 52), to "patients" over whom he has no control, and who are free to administer the drug to themselves or to sell

it to others, it will be utterly impossible for the Government either to trace the drugs or to collect its revenues. Dealers' taxes will hardly ever be paid; for every registered physician can successfully claim the right to act as a dealer. All barriers of law will be broken down; and utter confusion will result.

CONCLUSION

It is therefore respectfully submitted that the judgment of the Circuit Court of Appeals, affirming the petitioner's conviction, should be affirmed by this Court.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.

NOVEMBER, 1925.

Appendix A

Tabulation of the amount of morphine consumed in Dr. Boyd's *office practice* during the five months May-September, 1923 (in addition to prescriptions filled for patients). This was the period covered by the indictment.

Purchases from Read House Pharmacy (R. 23):

May 13	1,200	½	grain	tablets
May 17	1,200	"	"	"
May 21	1,200	"	"	"
May 26	1,200	"	"	"
June 2	2,400	"	"	"
June 10	1,200	"	"	"
June 25	1,200	"	"	"
July 11	1,200	"	"	"
July 15	1,200	"	"	"
July 21	1,200	"	"	"
July 25	700	"	"	"
July 27	1,200	"	"	"
August 5	1,200	"	"	"
August 9	1,200	"	"	"
August 14	1,200	"	"	"
August 19	1,200	"	"	"
August 28	1,100	"	"	"
September 3	1,200	"	"	"
September 15	1,200	"	"	"
September 20	1,200	"	"	"
September 30	1,200	"	"	"

Purchases from Fritz & Well Drug Co. (R. 24):

August 2	100	"	"	"

Purchases from the Miller Pharmacy (R. 25):

May 2	300	"	"	"
May 4	1,000	"	"	"
June 1	1,400	"	"	"
June 14	1,200	"	"	"
June 19	300	"	"	"
June 20	1,200	"	"	"
June 27	1,200	"	"	"
July 3	1,200	"	"	"
July 7	1,200	"	"	"
July 27	200	"	"	"
August 1	1,200	"	"	"
September 9	1,200	"	"	"

Total: 37,500 ½ grains=18,750 grains=93,750 normal doses (at ⅕ grain per dose).

These figures tally closely with the figures of 35,550 ½-grain tablets as shown by Dr. Boyd's own records (R. 15), and with the 32,700 ½-grain tablets which he finally admitted having purchased. (R. 51.) This is in addition to 802 prescriptions filled by patients during the same period, calling for 25,678 grains more. (R. 52.)

Dr. Boyd's purchases in five months (18,750 grains, or 93,750 normal doses) averaged 3,750 grains, or 18,750 normal doses, per month.

The witness Park testified that 40 ½-grain tablets (50 normal doses) was the average monthly quantity purchased by physicians. (R. 24.) On this basis, Dr. Boyd's requirements were 375 times more than the average.

Dr. Steele testified that 24 ¼-grain tablets (30 normal doses) would last him from 4 to 6 months. (R. 34.) This would be at the rate of about 5 normal doses per month. Dr. Boyd used 3,750 times this amount.

Dr. Williamson testified that 60 grains a year (25 normal doses per month) was a fair average for physicians *who had to administer a large number of hypodermics.* (R. 39.) Dr. Boyd used 750 times this amount. Dr. Williamson added that ten times his figures (600 grains per year, or 250 normal doses per month) " would be as much as could be used *under any conditions.*" Dr. Boyd used 75 times this amount.

Dr. Boyd himself testified that he was not doing a general practice (R. 51), and later stated that: " in the course of the practice of medicine only," he would not use 100 ½-grain tablets in a year.

(R. 58.) He actually did use 900 times that amount.

It is submitted that on the questions of good faith and legitimate practice of the medical profession, these figures are conclusive against the petitioner.

Appendix B

The so-called " ambulatory treatment " has received the official condemnation of the American Medical Association. The following extracts are taken from the report of the Committee on Narcotic Drugs of the Council on Health and Public Instruction of the American Medical Association. (Journal of the American Medical Association, Vol. 76, part 2, No. 24, pages 1669–1771.) This report was rendered in 1921.

* * * * *

Your committee also called on Mr. L. G. Nutt, director of the Narcotic Field Force of the Bureau of Internal Revenue of the Treasury Department, and transmitted to him the opinion of the Council on Health and Public Instruction, to the effect that the medical profession emphatically condemns the practice of distribution of the habit-forming narcotic drugs to addicts, in the course of their treatment for addiction, in such manner that the addicts may administer the drug themselves. Briefly, the so-called ambulatory treatment of addicts was condemned, whether practiced by the private physician, or in a public institution such as the so-called " narcotic clinic," and the director was urged to make use of the full powers of the Internal Revenue Bureau, under the law, to put an end to this practice.

* * * * *

2. The Harrison Law was one of the Acts of Congress, enacted for the purpose of carrying out in

good faith its international treaty obligations under The Hague Convention above named. While technically a tax measure, the purpose and scope of the Harrison Law are such that it is in effect an excellent and desirable means of control by the government of the abuses incident to trade in the habit-forming narcotic drugs. There should be no ambiguity in the interpretation of its requirements by the medical profession, though under cover of the words, "in the course of his professional practice only," some have maintained that exemption is granted to physicians to prescribe or dispense the habit-forming narcotic drugs to addicts, alleging that they were so doing in an attempt to cure addiction; in reality, they were merely maintaining the addict in his customary use of narcotic drugs. Decisions of the courts thus far rendered have uniformly served to strengthen the obvious conclusion that such use of the professional privilege does not constitute proper professional practice.

* * * * *

A State law should embrace recognition of the clear purpose and intent of the Harrison Law, evidenced by the words, "in the course of his professional practice only," to prohibit distribution of narcotic drugs through physicians prescribing or dispensing them to addicts for self-administration, under the guise of administering the so-called "ambulatory reductive method of treatment" (*since such method does not constitute treatment in good faith, nor has it the sanction of professional practice*). Such proper control should be the basis of both state and federal laws. This intent ought to be clearly defined in a state

law, i. e., by definitely prohibiting the " ambulatory treatment " of addiction either by the private physician, or in institutions such as the so-called " narcotic clinic." (Italics ours.)

* * * * *

8. Your committee desires to place on record its firm conviction that any method of treatment for narcotic drug addiction, whether private, institutional, official or governmental, which permits the addicted person to dose himself with the habit-forming narcotic drugs placed in his hands for self-administration, is an unsatisfactory treatment of addiction, begets deception, extends the abuse of habit-forming narcotic drugs, and causes an increase in crime. Therefore your committee recommends that the American Medical Association urge both federal and state governments to exert their full powers and authority to put an end to all manner of such so-called ambulatory methods of treatment of narcotic drug addiction, whether practiced by the private physician or by the so-called " narcotic clinic " or dispensary.

In the opinion of your committee, the only proper and scientific method of treating narcotic drug addiction is under such conditions of control of both the addict and the drug, that any administration of a habit-forming narcotic drug must be by, or under the direct personal authority of the physician, with no chance of any distribution of the drug of addiction to others, or opportunity for the same person to procure any of the drug from any source other than from the physician directly responsible for the addict's treatment.

* * * * *

See also an article by Dr. A. C. Prentice, a member of the Committee which rendered the above report, entitled "The Problem of the Narcotic Drug Addict," in Journal of the American Medical Association, vol. 76, part 2, page 1551 (especially at pages 1552, 1553, and 1555).

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